BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DARRELL D. MAYS Claimant	)	
VS.	)	
GCI CASTINGS, INC. Respondent	)	Docket No. 1,003,531
AND	)	
TWIN CITY FIRE INSURANCE CO. Insurance Carrier	)	

ORDER

Claimant requests review of a preliminary hearing Order entered by Administrative Law Judge Julie A.N. Sample on June 17, 2002.

ISSUES

The Administrative Law Judge denied claimant's request for medical and temporary total disability benefits pursuant to K.S.A. 44-501(d) because when the accident occurred claimant was not wearing a safety belt/back brace that was voluntarily provided by respondent to be worn by claimant while lifting.

The claimant raises the following issues on review: (1) whether the Administrative Law Judge exceeded her jurisdiction in determining the defense of failure to use a safety device had been met as set forth in K.S.A. 44-501(d); and, (2) whether the "back brace" provided by respondent constitutes a safety device, guard or protection as defined by K.S.A. 44-501(d)(1).

Respondent argues the Administrative Law Judge's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant's job required him to lift heavy iron castings. On March 28, 2002, claimant felt a twinge in his back as he reached inside a crate to remove some iron castings. Respondent had provided claimant with a safety belt/back brace to wear while lifting. Claimant was not wearing the device when the injury occurred and he further admitted he knew he was required to wear the device.

K.S.A. 44-501(d)(1) provides:

> If the injury to the employee results from the employee's deliberate intention to cause such injury; or from the employee's willful failure to use a guard or protection against accident required pursuant to any statute and provided for the employee, or a reasonable and proper guard and protection voluntarily furnished the employee by the employer, any compensation in respect to that injury shall be disallowed.

The foregoing statute is supplemented by K.A.R. 51-20-1 which provides:

> **Failure of employee to use safety guards provided by employer.** The director rules that where the rules regarding safety have generally been disregarded by employees and not rigidly enforced by the employer, violation of such rule will not prejudice an injured employee's right to compensation.

Although claimant was aware of the requirement that he wear the safety belt/back brace while lifting at work, he noted that depending on the weight of the item he would not always put the device on before performing the lifting necessary to package orders. He testified:

> Q. Okay. So you were aware that you were supposed to be wearing a safety belt and that your employer thought it was important to wear your safety belt to prevent work-related injuries to the workplace; is that correct?
>
> A. Yes.
>
> Q. And they provided you with the belt; is that correct?
>
> A. Yes.
>
> Q. And you chose of your own choice to not wear the belt; is that true?
>
> A. I would wear it from time to time but this particular morning I was rushing, I didn't usually - - when it came to lifting heavy casting 350 or 450 I always wore it but this particular day I didn't.
>
> Q. Now, when you say 350 or 450 are those pounds?
>
> A. Pounds.

Q. That's not a particular type of casting?

A. No, those are - - 300, 400, 500 pounds, I wore my belt.

Q. If it was less than that - -

A. You know, small orders, 60, 70 pounds I'd whip them out.

Q. Was it just kind of a hassle to put it on so you chose not to?

A. No, it was a matter of it felt awkward. The heat and various things it was cumbersome and when I was in a hurry, I just wouldn't do it.[1]

The claimant's supervisor, Robert Trump, testified that when he would be in the warehouse and observe claimant not wearing the safety belt/back brace he would request that claimant wear the device. Mr. Trump testified:

Q. Did you have opportunity to discuss the need to wear the back brace with him on several occasions?

A. Yes. As I would pass to and from the warehouse if I noticed it wasn't being worn I would mention to Mr. Mays that, you know, "This is something that we do require, would you wear that?" There were occasions when he would accept it and wear it, there were occasions when he did not.[2]

Finally, the supervisor had claimant sign a letter regarding his failure to wear the device. The letter dated September 4, 2001, provided:

This letter is to serve notice that GCI Castings, Inc has provided appropriate back support to be used during lifting of product manufactured and distributed by GCI Castings, Inc.

By signing this letter you are agreeing that GCI Castings Inc has supplied this support, requested on numerous occasions that it be worn during all lifting actions while on the premises of GCI Castings, and during our business hours.

It has been noted that you choose not to wear the support unless requested by GCI Castings, Inc to do so. By choosing not to wear this support you are waiving any right to file a complaint against GCI Castings, Inc should you incur a work related injury by not wearing the support brace provided and required of you to wear.[3]

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[1]Transcript of Preliminary Hearing dated June 12, 2002, at 17-18.

[2]Id. at 26-27.

[3]Id., Respondent's Exhibit D.

The evidence establishes claimant was provided a safety device by the respondent and knew he was required to wear it while lifting in the performance of his job duties. Claimant admitted he would wear the device while lifting heavy items but chose not to wear it while lifting lighter weight items. When claimant's supervisor observed claimant without the device, he would remind claimant it was required and would request claimant wear it. Finally, the supervisor required claimant to sign a letter waiving the right to file a claim if injured at work by not wearing the device.

The Administrative Law Judge's analysis was based on case law and previous Board decisions that interpreted the language of K.S.A. 44-501(d), specifically, what constitutes willful failure to use a provided guard or protection against accident. The Administrative Law Judge concluded claimant's refusal to wear the safety belt/back brace was willful and therefore denied the claim. However, the Board concludes the Administrative Law Judge's decision denying benefits must be reversed based upon a different analysis of the facts in this case.

The Board concludes that although there was a requirement claimant wear a safety belt/back brace, such requirement was not rigidly enforced. As previously noted, the administrative regulation promulgated to implement the requirements K.S.A. 44-501(d) mandates that when safety rules are generally disregarded by employees and not rigidly enforced by the employer, then violation of the rules will not prejudice an injured employee's right to compensation.

In this case the enforcement of the requirement to wear the safety belt/back brace consisted of the claimant's supervisor requesting claimant wear the device when he happened to observe claimant working without it. This apparently occurred on numerous occasions. The respondent then points to the letter signed by claimant on September 4, 2001, as an indication of progressive discipline and rigid enforcement of the policy that the device be worn.

The Board disagrees. Initially, the actions of the supervisor in merely requesting claimant wear the device cannot be said to be rigid enforcement of the safety rule, especially when claimant did not always comply with the supervisor's request. Moreover, as previously noted, the letter did not demand the safety belt/back brace be worn, instead, it purports to require claimant to waive the right to file a claim if injured while not wearing the safety belt/back brace at work. By adopting such a course of action the respondent, as a practical matter, conceded to claimant's failure to wear the safety belt/back brace, rather than enforcing the requirement.

Rigid enforcement of the safety requirement would have been evidenced by progressive discipline including suspension from work for failure to wear the device. Further violations would have resulted in more severe punishment up to and including termination. That is the method respondent chose, in this case, to enforce its attendance policy.

The reason for safety rules, guards and other protective devices is to prevent workplace injury. However, upon obtaining the purported release from liability the respondent then allowed claimant to perform his work activities without the alleged safety device. The method of enforcement adopted by respondent does not prevent workplace injury but, instead, merely attempts to shift liability for such injury to the claimant.[4] Again, such action does not equate to rigid enforcement of the safety policy.

The Board concludes that, under the facts of this case, respondent's safety policy was not rigidly enforced and cannot be utilized as a defense to the claim. The Administrative Law Judge's Order denying benefits is reversed.

At preliminary hearing the parties stipulated at that time claimant was temporarily and totally disabled. The parties further stipulated that if benefits were granted the compensation rate is $260.01 and respondent should designate the treating physician. Accordingly, claimant is awarded benefits based upon the parties' stipulation.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Julie A.N. Sample dated June 17, 2002, is reversed and claimant is awarded benefits pursuant to the parties' stipulation.

IT IS SO ORDERED.

Dated this _____ day of September 2002.

_____
BOARD MEMBER

c: William W. Hutton, Attorney for Claimant
Heather Nye, Attorney for Respondent
Julie A.N. Sample, Administrative Law Judge
Director, Division of Workers Compensation

[4] It must be noted that K.A.R. 51-21-1 provides that a worker cannot contract with the employer to relieve the employer of liability in case of an accident.